No. 92-1410

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

JOSEPH BRESS, as Executive Director of the Governor's Office of Employee Relations; N.Y.S. DEPARTMENT OF AUDIT & CONTROL; STATE OF NEW YORK; MARIO CUOMO, as Governor of the State of New York; EDWARD V. REGAN, as Comptroller of the State of New York,

Petitioners,

against

RAND CONDELL, as President of the Public Employees Federation, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether in the face of available alternative measures that violate neither law nor contract, the Contract Clause permits the State of New York to legislatively impair a collective bargaining agreement between the State and a union representing certain State employees by withholding earned wages.

2. Whether the order to repay wages withheld pursuant to the challenged legislation was merely ancillary to the prospective relief awarded enjoining the continued application of the statute and thus not in violation of the Eleventh Amendment.

3. Whether, in light of the state court judgment on independent grounds ordering repayment of salary withheld pursuant to the challenged legislation, any Eleventh Amendment claim petitioners might have should be considered by this Court in the exercise of its certiorari jurisdiction.

Table of Contents.

Page

Questions Presented i

Table Of Authorities iii

Statement Of The Case 1

Decision of the District Court 4

Argument 6

POINT I. The Court of Appeals correctly held that Chapter 947 violates the contract clause. There is no basis for the exercise of this Court's discretionary jurisdiction 6

POINT II. The repayment order does not violate the Eleventh Amendment 18

Conclusion 25

APPENDIX:

Opinion and Award of Herbert L. Haber, Arbitrator, Dated June 22, 1992 ..... A1

Decision of New York Supreme Court, Albany County, Dated July 30, 1992 ..... A10

Judgment of New York State Supreme Court, County of Albany, Entered August 12, 1992 ..... A13

TABLE OF AUTHORITIES.

Page

CASES:

Association of Surrogates and Supreme Court Reporters Within the City of New York v. State of New York, 940 F.2d 766 (2d Cir. 1991) cert. denied ____ U.S. ____, 112 S. Ct. 936, 117 L.Ed.2d 107 (1992) ("*Surrogates I*") ..... *passim*

Association of Surrogates and Supreme Court Reporters Within the City of New York v. State of New York, 79 N.Y.2d 39, 580 N.Y.S.2d 153 (1992) ("*Surrogates II*") ..... *passim*

Association of Surrogates and Supreme Court Reporters Within the City of New York v. State of New York, 78 N.Y.2d 143, 573 N.Y.S.2d 19 (1991) 9

Dwyer v. Regan, 777 F.2d 825 (2d Cir. 1985), *modified*, 793 F.2d 457 (2d Cir. 1986) 21

Edelman v. Jordan, 415 U.S. 651 (1974) 23

Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983) 13

Ex parte Young, 209 U.S. 123 (1908) 20, 23

Huron Holding Co. v. Lincoln Mine Operating Co., 312 U.S. 183 (1941) 19

Page

McDermott v. Unified Court System, 1991 WL 302648 (Sup. Ct. Albany County, June 21, 1991) 15

Papasan v. Allain, 478 U.S. 265 (1986) 21

Petrella v. Siegel, 843 F.2d 87 (2nd Cir. 1988) 19

Matter of Public Employees Federation v. State of New York (unreported arbitration award) (June 22, 1992) 7

Quirk v. Regan, 148 Misc.2d 300, 565 N.Y.S.2d 422 (Sup. Ct. Albany County, 1991)..... 15, 17

Matter of Shafer v. Bress, Index No. 4282-92 (Sup. Ct., Albany County, July 24, 1992)..... 7

Matter of Subway-Surface Supervisors Association v. New York City Transit Authority, 44 N.Y.2d 101, 404 N.Y.S.2d 323 (1978)..... 14, 15

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977)..... 11, 13

FEDERAL CONSTITUTIONAL PROVISIONS:

U.S. Const. Art. I, §10..... *passim*

U.S. Const. amend. XI..... *passim*

Page

STATE STATUTES:

2 McKinney's 1990 Session Laws of New York, 1990, 4289-4343 at 4338-40 ("Chapter 947") ..... *passim*

New York Civil Service Law §200 *et seq* 13

New York State Finance Law §200 2

No. 92-1410

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992.

JOSEPH BRESS, as Executive Director of the Governor's Office of Employee Relations; N.Y.S. DEPARTMENT OF AUDIT & CONTROL; STATE OF NEW YORK; MARIO CUOMO, as Governor of the State of New York; EDWARD V. REGAN, as Comptroller of the State of New York,

Petitioners,

against

RAND CONDELL, as President of the Public Employees Federation, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief in Opposition to the Petition for a Writ of Certiorari

Statement of the Case

The respondent PEF is a public sector labor union and the exclusive bargaining representative for employees of the executive branch of the State of New York in the Professional, Scientific and Technical Services ("PS&T") bar-

gaining unit. (J.App.10-11)[1] PEF and the State of New York entered into a collective bargaining agreement for the PS&T unit for the stated duration of April 1, 1988 through March 31, 1991. (J.App.35) In the absence of a negotiated successor agreement, the 1988-91 agreement continues in effect under New York law. (J.App.39) The collective bargaining agreement contains a provision requiring that salary payments be computed on the basis of ten working days, a provision setting forth designated annual salary levels, and a provision for a negotiated "lag pay" limited to two weeks. (J.App.35-36)

In December 1990, the State Legislature enacted Chapter 947 of the Laws of 1990 (New York *State Finance Law* § 200 (2-a [a])) which imposed a five-day lag payroll on executive branch employees of the State of New York, including the employees represented by PEF.[2] (J.App.36-37) Pursuant to Chapter 947, the affected employees received only nine-tenths of their salary for each of

[1]References to "J.APP. ____" are to pages of the joint appendix in the Court of Appeals. References to "P.APP. ____" are to the pages of the appendix to the Petition. References to "R.APP. ____" are to the pages of the appendix in this brief in opposition to the petition.

[2]This was not the first lag payroll imposed on state employees covered by collective bargaining agreements. In May 1990, the state legislatively imposed a 10-day lag payroll on non-judicial employees of the state Unified Court System. 1990 N.Y. Laws, ch. 190 §375. The lag payroll was imposed for the stated purpose of raising $7 million to eliminate a budget shortfall. This legislation was challenged by various unions representing these employees. The Court of Appeals for the Second Circuit held that the legislation violated the Contract Clause, enjoined the operation of the statute and ordered repayment of the lagged salary, plus interest. *Association of Surrogates and Supreme Court Reporters Within the City of New York v. State of New York*, 940 F.2d 766 (2d Cir. 1991), *cert. denied* ____ U.S. ____, 112 S. Ct. 936, 117 L.Ed.2d 107 (1992) ("*Surrogates I*"). The petition for writ of certiorari in *Surrogates I* was only on Eleventh Amendment grounds.

(Footnote continued on next page.)

five bi-weekly periods between December 27, 1990 and March 31, 1991. (J.App.37) Pursuant to Chapter 947, the withheld compensation will not be released until the employee leaves state employment, whenever that might be. (J.App.37-38) In addition, all new employees hired after December 27, 1990 are subject to this lag during their first ten weeks of employment. (J.App.57)

The respondent acknowledges that the state faced a budget deficit in fiscal year 1990-91, a deficit estimated by petitioners to be $1,005 million in November 1990. (J.App.94,187) In the 1987-88, 1988-89 and 1989-90 fiscal years the state faced budget deficits of $.133 billion, $.529 billion and $.775 billion respectively. (J.App.87, 171) The state budgets in these fiscal years were balanced by use of tax and revenue anticipation notes and/or one-shot revenues and transfers. (J.App.87, 171) This borrowing was required even though the state implemented a June 1988 "deficit reduction plan" in addition to the November 1990 legislation at issue in this case. (J.App.171)

It is important to understand, however, that in November 1990, it was the Governor's stated intention to eliminate the budget deficit without issuing tax and revenue anticipation notes, levying new taxes, raising rates on existing taxes, or

(Footnote continued.)

In 1991, the State again attempted to impose a lag payroll on employees of the state Unified Court System by legislation. 1991 N.Y. Laws, chs. 166 §382 and 171 §1, New York *State Finance Law* §200 (2-b) (McKinney's Supp. 1992). This legislation, creating a five-day lag, was intended to save $10.7 million to offset anticipated state budget shortfalls for fiscal year 1991-92. The New York Court of Appeals struck down this legislation as violative of the Contract Clause and permanently enjoined its enforcement. *Association of Surrogates and Supreme Court Reporters Within the City of New York v. State of New York*, 79 N.Y.2d 39, 580 N.Y.S.2d 153 (1992) ("*Surrogates II*").

laying off additional executive branch employees. (J.App.94, 187-89) These options, singly or in combination, while available to petitioners, were rejected in November 1990 by the Governor as "unwise fiscal policy" (J.App.175, 188), as causing "further damage to the State's competitive position vis-a-vis other states" (J.App.189), or as having "unacceptable" adverse impacts on state programs and employees. (J.App.192)

Despite the Governor's deficit reduction plan, including the enactment of Chapter 947 and the subsequent collection of approximately $128 million in lagged wages from executive branch employees, the state nevertheless issued tax and revenue anticipation notes to close an actual budget gap of $1.081 billion at the end of the 1990-91 fiscal year. (J.App.87-98, 99, 175, 194-95)

Decision of the District Court

The district court declared that Chapter 947 violates the Contract Clause, and enjoined petitioners ". . . from continuing the effects and application of Chapter 947 and . . . directed [petitioners] to return the withheld monies, plus interest in the amount of seven percent calculated from March 31, 1991 to the respondent within sixty days of this judgment." (P.App.A18) Judgment was entered on June 18, 1992.[3]

The district court found, based on the precedents established by *Surrogates I* and *Surrogates II*, that Chapter 947 effected a substantial impairment of contract (P.App.A26) and that the legislation was neither reasonable nor necessary because there were other available legal alternatives.

[3]The district court granted petitioners' application for a stay of that portion of the judgment that required the return of the lagged salary within sixty days, pending the appeal to the Court of Appeals. (J.App.318-19)

(P.App.A27) The district court also rejected the petitioners' Eleventh Amendment arguments, finding that the requested injunctive relief was a prospective remedy and that the return of withheld salary would be relief ancillary to that prospective remedy. (P.App.A28)

Decision of the Court of Appeals

The Court of Appeals, relying on its decision in *Surrogates I* and on the decision of the New York State Court of Appeals in *Surrogates II*, found that the challenged legislation did effect a substantial impairment of contract and that the impairment was in violation of the Contract Clause. (P.App.A10,A12) The court affirmed the judgment of the district court.[4] The Court of Appeals stated that the pivotal question was "whether the lag payroll measure was reasonable and necessary notwithstanding the availability of other alternatives." (P.App.A11) The availability of other alternatives, even if they were, as described by the court, "unpopular", and the court's assessment that the state's fiscal crisis was not an "extreme crisis," led to the court's conclusion that "...the conditions that might justify the use of lag payrolls were not present here." (P.App.A12)

The Court of Appeals also rejected the state's attempts to characterize the withholding as a "lump sum separation payment" rather than a lag payroll for purposes of its Eleventh Amendment defense. The court found that there was no basis to distinguish Chapter 947's five-day withholding from the ten-day withholding in *Surrogates I*. (*Id.*) The court held that the release of the withheld salary was not

[4]In response to a motion by petitioners, the Court of Appeals stayed the issuance of its mandate for thirty days pursuant to *FRAP* R.41(b). (P.App.A16)

barred by the Eleventh Amendment because it was ancillary to the prospective injunctive relief ordered. (P.App.A13)

ARGUMENT

POINT I

The Court of Appeals correctly held that Chapter 947 violates the contract clause. There is no basis for the exercise of this Court's discretionary jurisdiction.

The respondent submits that the "special and important reasons" required by the rules of this Court for granting a petition for a writ of certiorari are not present in this case. Respondent's contention is supported first by the fact that this Court denied the petition for writ of certiorari in *Surrogates I*, a case presenting factual and legal issues virtually identical to those in the present action. *Surrogates I*, *supra*, 940 F.2d 966, *cert. denied*, ____ U.S. ____, 112 S.Ct. 936. While the petition in *Surrogates I* raised only the claim that the order of repayment of lagged salary violated the Eleventh Amendment, the fact that petitioners failed to raise contract clause claims and the fact that this Court declined to hear the same Eleventh Amendment claims presented in this case support a denial of this petition.

In addition, a principal purpose of the Supreme Court's certiorari jurisdiction is to resolve conflicts among the Circuit Courts of Appeals or between state courts of last resort and the Circuit Courts of Appeals on federal questions. *Braxton v. U.S.*, ____ U.S. ____, 111 S.Ct. 1854, 1857 (1991); *Rules of the Supreme Court*, R. 10.1(a).

This case presents absolutely no judicial conflicts concerning the constitutionality of New York's lag payrolls. All the federal court challenges to New York's legislatively imposed lag payrolls in 1990 and 1991 have been within the Second Circuit. *Surrogates I, supra; Condell v. Bress*, ____ F.2d ____ (2nd Cir. January 8, 1993). (P.App.A1) Therefore, there is no conflict between the Circuit Courts of Appeals "on the same matter." *Rules of the Supreme Court*, R. 10.1(a). Nor is the Court of Appeals' January 8, 1993 decision in conflict with a decision of a state court of last resort. The New York Court of Appeals has also held that the lag payroll legislation violates the Contract Clause. *Surrogates II, supra*, 79 N.Y.2d 39, 580 N.Y.S.2d 153.

There is no real dispute that Chapter 947 impairs the collective bargaining agreement between PEF and the State. The effect of Chapter 947 on this collective bargaining agreement was the subject of a contract grievance arbitration in *Matter of Arbitration Between Public Employees Federation and State of New York*. (R.App.A1) In that case, the arbitrator ruled that the collective bargaining agreement was breached by Chapter 947. The award held that the State violated "the Agreement between the parties when the Governor submitted, the Legislature passed, and the Governor signed and implemented [Chapter 947]." (R.App.A ____) The arbitrator's decision and award were confirmed by a judgment of the State Supreme Court on July 30, 1992. *Matter of Shafer v. Bress*, Index No. 4282-92 (Sup. Ct., Albany County, July 24, 1992). (R.App.A ____) While the State has appealed this judgment, there can be no doubt that Chapter 947 impaired contract rights existing under the PEF/State agreement.

Both the district court and the Court of Appeals found, based on *Surrogates I* and *Surrogates II*, that Chapter 947 effected a substantial impairment of the contract between PEF and the State and that the impairment was not reasonable and necessary to further an important public purpose. *Surrogates I, supra*, 940 F.2d 766; *Surrogates II, supra*, 79 N.Y.2d 39, 580 N.Y.S.2d 153. The petitioners argue that this petition should be granted because the Court of Appeals failed to properly construe the scope of the Contract Clause. The petitioners contend that the severity of the fiscal crisis and the minimal impact of the "wage deferral" require a finding that Chapter 947 does not violate the Contract Clause.[5] Respondent submits, to the contrary, that the impairment was substantial and that it was not reasonable and necessary to balance the state budget for the 1991-92 fiscal year.

In *Surrogates I*, the Court of Appeals held that 1990 legislation which imposed a ten-day lag payroll on the non-judicial employees of the New York State Unified Court System impaired the contract rights created by the collective bargaining agreements between the respondent labor unions and the state. *Surrogates I, supra*, 940 F.2d 766. In so holding, the court noted that the lag, as implemented, withheld one day's pay for each of ten bi-weekly pay periods, so that the employees were paid for only nine out of ten working days for each of those pay periods. *Id.* at 769. The court noted the existence of provisions in the collective bargaining agreements which required that bi-weekly sal-

[5]It must be noted that while the petitioners now claim that neither *Surrogates I* nor *Surrogates II* involve a "genuine fiscal crisis" (Petition, p. 15), these same petitioners argued in both cases that in fact there was a fiscal crisis requiring the legislative impairment of public employee contracts.

aries be computed on the basis of ten working days and the State's history of imposing lag payrolls only by negotiated agreement. *Id.* at 769-770, 772. The court also noted the New York Court of Appeals' holding that the collective bargaining agreements become valid when ratified (*Association of Surrogates and Supreme Court Reporters Within the City of New York v. State of New York*, 78 N.Y.2d 143, 573 N.Y.S.2d 19 (1991),[6] and held that the lag legislation impaired the contractual rights contained in those agreements. *Id.* at 771.

The Court of Appeals rejected the State's claim that the 1990 ten-day lag was insubstantial, pointing out that the lag was long-term, that it would not be repaid until separation from service ("perhaps 45 years"), and that the affected employees depend upon their full paycheck to meet their expenses. *Surrogates I, supra*, 940 F.2d at 772. As the court noted, "it would be inconsistent for us to accept the petitioners' argument that this impairment was necessary because of a governmental fiscal crisis, and to do so by disregarding the personal fiscal crisis that the lag payroll would create." *Id.* The court found further support for the conclusion that the impairment was substantial in the existence of the specific provision in the contracts for bi-weekly salary payments computed on a ten-day basis, particularly in light of the state's past history of imposing lag payrolls only by agreement. *Id.*

[6]The New York Court of Appeals issued this decision upon a certified question referred to it by the Court of Appeals in *Surrogates I*. The question was whether the compensation provisions of the multi-year collective bargaining agreement were contingent upon annual legislative approval. The New York Court of Appeals held that the obligations of multi-year contracts become binding upon initial legislative approval. *Association of Surrogates, supra*, 78 N.Y.2d at 156, 573 N.Y.S.2d at 25.

In *Surrogates II*, the New York Court of Appeals held that 1991 legislation imposing a five-day lag payroll on non-judicial employees of the Unified Court System impaired contract rights of the affected employees. The contract rights impaired by the 1991 legislation were the same as those involved in *Surrogates I*: the right to bi-weekly pay calculated on the basis of ten working days. *Surrogates II, supra*, 79 N.Y.2d at 43-44, 580 N.Y.S.2d at 154. The New York Court of Appeals rejected the state's argument that a five-day lag was insubstantial. The five-day lag, according to the court:

> . . . results in withholding 10% of an employee's expected wages each week over a period of 10 weeks: salary which will not be paid until the employee leaves State service, which may be years in the future. This is not an insubstantial impairment to one confronted with monthly debt payments and daily expenses for food and other necessities of life. [*Surrogates II, supra*, 79 N.Y.2d at 46-47, 580 N.Y.S.2d at 156.]

The five-day deferral under Chapter 947 cannot be considered insubstantial because it amounts to "only 1.92 percent" of each employee's annual salary, as petitioners argue. It is also ten percent of each employee's salary in each of the five payroll periods affected. The employees affected by Chapter 947, no less than the employees in *Surrogates I* and *Surrogates II*, depend on full paychecks to meet expenses. The Court of Appeals properly held that, under *Surrogates I* and *Surrogates II*, the impairment was substantial.

Chapter 947 must also be held to effect a substantial impairment of the collective bargaining agreement between PEF and the State because of its impact on the bargaining relationship between the parties. As noted in *Surrogates I*, not only did the contract require bi-weekly salaries to be paid on a basis of ten working days, but the petitioners have, in fact, *negotiated* changes in this provision with PEF in 1982 and 1988. (J.App.14-15) *Surrogates I, supra*, 940 F.2d at 772. The impairment, therefore, is of both individual rights and collective rights. The individual is entitled to full payment of salary under the contract. The employees, collectively, are entitled to rely on the terms of their collective bargaining agreement and the benefits obtained through negotiation.

Having found a substantial impairment of contract, it is necessary to determine whether that impairment was "reasonable and necessary to further an important public purpose." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977). The question is whether, without modifying the obligation at all, the petitioners could have adopted alternative means of achieving their goals. *Id.* at 29-30. Even a more moderate modification of the contract obligation is inappropriate where a state's goal could be achieved absent any such modification. *Id.* at 30-31.

Petitioners continue to assert that the public purpose in this case was sufficient "in the context of a 1.92% wage deferral, to satisfy the test of the Contract Clause that the means chosen are reasonable and necessary in light of the magnitude of the public need." (Petition, p.14) Quite understandably, the petitioners attempt to paint the public purpose at issue with the broadest possible brush. They assert that "[t]he public interest in continuing vital governmental

services . . . as well as the severity of this budget crisis" constitute the public purpose at issue. (Petition, pp. 13-14)

The public purpose established by the record in this case, however, was to balance the 1990-91 state budget. (J.App.187) It is not disputed that the public has an interest in a balanced budget. The constitutional infirmity here is that petitioners impaired contractual obligations to obtain a $128 million loan from executive branch employees to remedy a budget deficit of more than $1 *billion* in the face of alternatives which would not have impaired petitioners' contractual obligations.[7] (J.App.187, 190)

Petitioners argued to the Court of Appeals that in November 1990 there was "no realistic alternative" to the five-day lag. Chapter 947 did include measures intended to reduce the budget deficit other than the five-day lag. (J.App.191)

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[7]Petitioners state, at page 15 of the petition, that Chapter 947 "involved $128 million in direct reductions in expenditures for FY 90-91..." and that $50 million is in controversy in this case. Petitioners also state that all other public employee unions had $78 million in salary withheld, implying that $50 million in salary was directly withheld from PS&T unit members. This is inaccurate. Respondent does not dispute the accuracy of the $128 million total from salary withholding. The share of that $128 million from PS&T unit salaries was approximately $38 million. The $50 million figure can only be arrived at if interest on the $38 million is included.

Petitioners also state that other public employee unions subject to Chapter 947 have settled their lawsuits against the state as part of successor collective bargaining agreements. What petitioners fail to note, however, is that at least two of the contract settlements involved the repayment by April 1, 1995 of all salary withheld pursuant to Chapter 947 and an agreement that Chapter 947 would not be applied to new members of these bargaining units. This can only be seen as clear evidence that what the State faced in November and December 1990 involved balancing the state budget rather than the kind of deep fiscal crisis that could legitimately be compared to the "Great Depression."

This did not leave the petitioners without any legal alternatives to contract impairment. The problem with petitioners' argument is that the obvious alternative, short term borrowing, followed by either tax increases, program cuts or layoffs to repay such a loan was rejected as unwise by the Governor. The alternative of trying to negotiate a lag payroll, as the State had done with PEF in 1982 and 1988, and which is required under New York *Civil Service Law* §§200 *et seq.*, was also apparently rejected by the Governor. The petitioners did what the courts have clearly held a state cannot do: they placed impairment of contract on a par with any other policy alternative. *United States Trust, supra,* 431 U.S. at 30-31.

The application of the "reasonable and necessary" test is different in cases where the state impairs its own contract than in other cases. Where the state impairs its own contract, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *United States Trust, supra,* 431 U.S. at 26, *Surrogates I, supra,* 940 F.2d at 771-72.

In the context of monetary obligations provided for by contract, it is axiomatic that a state can always envision an extra use for its money. *Id.* However, if a state were allowed to choose to reduce its contractual financial obligations whenever it wanted to spend money on what is regarded as an important public purpose, the Contract Clause would provide no protection at all. *Id.* at 26. As stated in *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*:

> When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmen-

> tal unit to its contractual obligations when it enters financial or other markets. [citations omitted] [459 U.S. 400, 412, n. 14 (1983).]

In support of their arguments as to the reasonableness and necessity of Chapter 947, petitioners point to an allegedly similar situation in which the New York Court of Appeals upheld wage-freeze legislation against a contract clause challenge. *Matter of Subway-Surface Supervisors Assn. v. New York City Transit Authority*, 44 N.Y.2d 101, 404 N.Y.S.2d 323 (1978). (Petition, p.14) As the New York Court of Appeals noted in rejecting this same argument in *Surrogates II*, *Subway-Surface* did not involve a "similar" situation and does not require a finding that Chapter 947 is a permissible contract impairment. *Surrogates II*, *supra*, 79 N.Y.2d at 47, 580 N.Y.S.2d at 156-57.

The state legislation challenged in *Subway-Surface* "suspended" a *prospective* salary increase for supervisory personnel employed by the New York City Transit Authority in the face of a legislatively declared financial emergency. 44 N.Y.2d at 106, 404 N.Y.S.2d at 326. The challenged legislation provided that the wage increase would be suspended for up to one year, unless specifically extended by a review board, but in no event longer than the duration of the emergency. *Id.* This is a very different situation from the impairment created by Chapter 947. First, it involved the loss of future wage increases rather than actual earned wages. Second, as the New York Court of Appeals noted:

> Unlike this case [*Surrogates II*] where earned salaries may be deferred for indefinite periods of perhaps 25, 30 or 40 years, until the employee leaves State service, the *Financial Emergency Act* consid-

> ered in *Subway-Surface* was a temporary measure. . . . It postponed a future benefit to employees for one year only or until the emergency was declared over [citation omitted]. [*Surrogates II, supra*, 79 N.Y.2d at 47, 580 N.Y.S.2d at 157.]

The judicial decisions which are the most applicable to the present case are those which invalidated lag payroll legislation enacted in New York in 1990 and in 1991: *Surrogates I, supra; Surrogates II, supra*; *Quirk v. Regan*, 148 Misc.2d 306, 565 N.Y.S.2d 425 (Sup. Ct. Albany Co. 1991); and *McDermott v. Unified Court System of the State of New York*, 1991 WL 302648 (Sup. Ct. Albany Co., June 21, 1991). Each and every court that considered the legislation found it invalid.

Petitioners claim that there is a material difference in the economic situation surrounding enactment of Chapter 947 (enacted in December 1990), as compared to the circumstances surrounding enactment of the May 1990 lag payroll legislation for court employees, which renders *Surrogates I* inapplicable to the present case. Petitioners also assert that the Contract Clause violation in *Surrogates I* was based on two factors very different from the facts of this case: that only $7 million out of a judiciary budget of almost $1 billion was gained by lagging only judicial employees and that the purpose of the lag was to expand the court system.

The very language of *Surrogates I*, however, precludes such attempted distinctions. In addressing the 1990-91 fiscal year, the court referred to the "fiscal crisis" and also to "the State's perennial fiscal crisis". *Surrogates I, supra*, 940 F.2d at 769, 774. *Surrogates I* was not based solely upon the concern that the State was financing an expansion of the

court system via the lag payroll, as evidenced by the fact that the Court of Appeals expressly assumed, "for the sake of argument", that the maintenance and expansion of the court system constitutes an important public purpose, and then proceeded to find that the means chosen by the state were not "necessary" to the achievement of the stated goals. 940 F.2d at 773. As was clearly pointed out in *Surrogates I*, the 1990 court employees' lag was to be used both to expand the court system and to save $7 million: in other words, to balance the Judiciary budget. *Surrogates I, supra*, 940 F.2d at 768. This is precisely the public purpose at issue in this case.

Furthermore, in *Surrogates II*, the New York Court of Appeals invalidated lag legislation enacted in July 1991, rejecting the State's arguments that such legislation was justified by the fiscal circumstances of the 1991-92 fiscal year. *Surrogates II, supra*, 79 N.Y.2d at 47, 580 N.Y.S.2d at 156. Therefore, between *Surrogates I* and *Surrogates II*, the fiscal circumstances of fiscal year 1990-91 and the first part of fiscal year 1991-92 have been deemed an inadequate basis for justifying the state's imposition of a lag payroll on state employees. Indeed, petitioners themselves regard the fiscal circumstances relevant to enactment of Chapter 947 as identical to those relevant to the 1991-92 fiscal year lag legislation which was the subject of *Surrogates II*. Petitioners submitted virtually identical affidavits outlining the state's fiscal circumstances to the courts in this case, in *Surrogates II* and in litigation brought by another public employee union challenging Chapter 947. (J.App.89-90) Chapter 947, therefore, cannot be justified by the surrounding fiscal circumstances despite petitioners' rhetoric about the Great Depression and President Clinton's February 17, 1993 address to a joint session of Congress.

In sum, in accordance with the court decisions in *Surrogates I, Surrogates II, Quirk* and *McDermott,* Chapter 947 must, as the courts below held, be invalidated. Chapter 947 is not "reasonable and necessary". Alternatives did exist whereby the state could have achieved its goals without impairing respondent's contract rights. The state's purpose in enacting the legislation here at issue clearly was to raise revenue, create savings and/or cut costs, since the legislation was part of the 1990 Budget Bill. As the Court of Appeals held, the state could have achieved this purpose sufficiently without modifying its contract obligations at all. According to petitioners' own statements, impairment of contract was chosen over other legal, though less appealing, alternatives as a means to raise $128 million in an attempt to balance the state budget. As the New York Court of Appeals stated in *Surrogates II*: "[t]he choice of which revenue-raising or revenue-saving devices should be used is for others, not the courts, but the menu of alternatives does not include impairing contract rights to obtain forced loans to the State from its employees." 79 N.Y.2d at 47, 580 N.Y.S.2d at 156.

The Court of Appeals correctly held that Chapter 947 unconstitutionally impaired the contract between PEF and the state and was neither reasonable nor necessary to further an important public purpose. There is no Contract Clause issue presented by this case which merits review by this Court.

POINT II

The repayment order does not violate the Eleventh Amendment.

Petitioners contend that the order to repay salary withheld pursuant to Chapter 947 is in conflict with this Court's decisions prohibiting a retroactive award of money damages against a state. (Petition, pp. 17-18) The repayment order, according to petitioners, is a "patent error," plainly in violation of the constraints of the Eleventh Amendment and therefore warrants review by this Court.

Petitioners' Eleventh Amendment claim raises two questions to be considered by this Court: whether, in light of the state court judgment on independent grounds ordering repayment of lagged salary, this Court should review any Eleventh Amendment claim petitioners might otherwise have; and whether the order that petitioners return salary withheld pursuant to Chapter 947 is "ancillary" to the declaratory and injunctive relief also awarded.

Petitioners' Eleventh Amendment claim, even if it otherwise had merit, does not merit review by this Court due to the existence of a state court judgment which, on independent state law grounds, orders the repayment of salary withheld pursuant to Chapter 947. As noted at Point I, *infra*, an arbitrator ruled that the collective bargaining agreement between PEF and the State had been breached by the introduction, adoption, signing and implementation of Chapter 947. (R.App.A1, A8) The arbitrator ordered the repayment of all lagged salary, plus interest. (R.App.A8)

The Union, pursuant to New York *Civ. Prac. Law and Rules* Article 75, petitioned for judicial confirmation of the arbitration award, and the state cross-petitioned to vacate the award. (R.App.A11) The petition was granted and the award was confirmed by decision of the New York Supreme Court, Albany County, dated July 30, 1992. (R.App.A11) Judgment was entered on August 12, 1992. (R.App.A13) The court based its decision on the failure of the State to establish any of the statutory criteria for vacatur: that the arbitrator exceeded his authority, acted irrationally, or that the award violated public policy.[8] (R.App.A11)

Respondents do not suggest that this case has been mooted by the arbitration award. Neither the arbitration award nor the judgment confirming the award resolve the dispute concerning the constitutionality of the lag payroll legislation. The arbitrator found that the actions of the Governor and the Legislature in promulgating Chapter 947 constituted a violation of the collective bargaining agreement and awarded repayment of salary withheld as a remedy.

Moreover, the arbitrator did not rule, nor did he have jurisdiction to rule on the constitutionality of Chapter 947 or on prospective violations of the collective bargaining agreement. The arbitrator certainly had jurisdiction to remedy a breach of the collective bargaining agreement. He did not have jurisdiction to enjoin the continuing application of the statute. Therefore, whether Chapter 947 violates the Con-

[8]The State has appealed this judgment, and oral argument before the New York Supreme Court, Appellate Division, Third Department, is set for April 30, 1993. Of course, despite the appeal, the state court judgment is entitled to full *res judicata* effect. *Petrella v. Siegel*, 843 F.2d 87 (2nd Cir. 1988), *citing*, *Huron Holding Co. v. Lincoln Mine Operating Co.*, 312 U.S. 183 (1941).

tract Clause was properly considered by the Court of Appeals.

Therefore, even if this Court were to grant this petition and even if the judgment were to be vacated based on Eleventh Amendment grounds, the state court judgment would still require repayment of all salary withheld from PS&T unit members pursuant to Chapter 947. Only the prospective application of Chapter 947 is untouched by the state court judgment, and petitioners have already admitted that the Eleventh Amendment does not bar this relief. (Petition, p. 17, n.6) There is, therefore, no need for this Court to exercise its discretion to review any Eleventh Amendment claims petitioners might have in this case because its review would not be dispositive of the obligation of the State of New York to repay the lagged wages.[9]

As to the merits of petitioners' claim that the repayment order violates the Eleventh Amendment, respondent submits that repayment is the kind of ancillary relief permissible under this Court's Eleventh Amendment decisions. The Eleventh Amendment does not bar an action in the federal courts to require state officials to conform their conduct to the mandates of the Constitution. *Ex parte Young*, 209 U.S. 123 (1908). The power of the federal courts to force state officials to follow the Constitution, even when they are acting under state law or policy, is based on the fiction that a state official carrying out an unconstitutional state law or policy is stripped of his or her official authority and may be

[9]The State of New York has agreed with at least two of the unions representing executive branch employees to repay the withheld salary prior to April 1, 1995. This is yet another reason why this Court should not review petitioners' claims that the repayment order violates the Eleventh Amendment.

personally enjoined to follow the mandates of the Constitution. *Ex parte Young, supra,* 209 U.S. at 123; *Papasan v. Allain,* 478 U.S. 265, 276-77 (1986).

Generally, suits for retrospective relief for money damages against the state are barred, but prospective injunctive relief, even though it might have an ancillary effect on the state treasury, is not. *Dwyer v. Regan,* 777 F.2d 825, 835-36 (2d Cir. 1985), *modified,* 793 F.2d 457 (2d Cir. 1986). Applying this standard to the respondent's claims, it is respectfully submitted that the relief ordered is not barred by the Eleventh Amendment.

Petitioners argue that Chapter 947 is a "salary deferral" plan or a "lump sum separation payment" and not a lag. The significance of the different terminology is, according to the petitioners, that the lag invalidated in *Surrogates I* was a new impairment every two weeks because the payroll pay dates were two weeks late each time. Again according to the petitioners, if Chapter 947 impaired the PEF/State contract, it did so only prior to March 31, 1991 because actual pay dates for executive branch employees were not changed. As a result, by the time the district court rendered its decision and order, there was no part of Chapter 947 (aside from those provisions concerning new employees) left to enjoin.

This argument fails on several grounds. First, and most significantly, Chapter 947 requires that employees hired after January 1991, and therefore not subject to the initial lag, be lagged one day in each of their first five payroll periods of employment. (J.App.57) As the 1988-91 PEF/State agreement is continued pursuant to New York law until a successor agreement is negotiated, and as no such

agreement has been reached, new employees in the PS&T unit have been and will continue to be subject to the lag provided by Chapter 947. *Surrogates II*, *supra*, 79 N.Y.2d at 45, 580 N.Y.S.2d at 155. (J.App.39) While petitioners characterize this as a "relatively minor" aspect of the case, they do admit that enjoining the implementation of the Chapter 947 lag for newly-hired employees is purely prospective relief. (Petition, p. 17, n. 6) For this reason alone, the declaratory and injunctive relief ordered by the courts below is not barred by the Eleventh Amendment.

Second, petitioners' argument completely ignores the fact that Chapter 947 not only authorized the initial withholding, it authorizes the continued withholding of earned compensation from PS&T unit members. (J.App.37-38) This statutory authorization to withhold salary continues until the employee leaves state service--something which will happen at an unspecified future date. Absent Chapter 947, the petitioners have no legal authority to continue to hold these salary payments until this future event occurs. Additionally, Chapter 947 specifies the terms upon which future payment to individual employees is to be made. (*Id.*) Therefore, as to each and every employee who has had salary withheld pursuant to Chapter 947 and who has not yet left state service, it is the continuing implementation of Chapter 947, and that only, which allows petitioners to withhold this compensation, in violation of the contract between PEF and the state and in violation of the Contract Clause.

The distinction petitioners attempt to draw between a "true lag" and Chapter 947 is a distinction without any real difference. As noted by the Court of Appeals in *Surrogates I*, the court employees were "lagged" when, in each of ten payroll periods, they were paid for nine days rather than the

ten days actually worked, and were paid for 50 rather than 52 weeks' work in the 1990-91 fiscal year. 940 F.2d at 769. This is exactly what happened to the executive branch employees, except that it involved five payroll periods and 51 rather than 50 weeks. (J.App.54-61) In both cases, the statutes at issue authorize the petitioners to keep the salary earned by these employees for an indefinite, future period. In both cases, the employee is paid less compensation than he or she is due for services performed during a given period of time. In both cases, the collective bargaining agreement is impaired not only by the initial withholding, but by the statutorily authorized retention of an employee's salary until the employee leaves state service.

The injunction against the application of the lag payroll law prevents state officials from continuing to withhold an employee's earned compensation until he or she leaves state service. That the release of this compensation is mandated upon entry of judgment, rather than at some indefinite date in the future, does not make the relief retrospective.

Moreover, the fact that an injunction against Chapter 947 requires payment to individual state employees from the state treasury does not mean that there is an Eleventh Amendment bar. This result is ancillary to the injunction, which merely requires the petitioners to "shape their official conduct to the mandate of the Court's decrees." *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). Even if, therefore, salary withheld from individual state employees constitutes public funds, the restoration of salary withheld has merely an ancillary effect on the state treasury, a "permissible and often an inevitable consequence of the principle announced in *Ex parte Young*...." *Id.*

The Court of Appeals considered this same Eleventh Amendment defense in *Surrogates I*, in which the petitioners argued, in direct contradiction to their contentions in this case, that the May 1990 lag against the court employees was fully effectuated as of March 13, 1991 and that the claim for declaratory and injunctive relief was therefore moot. *Surrogates I*, *supra*, 940 F.2d at 774. The Court of Appeals rejected this argument and held that the 1990 lag payroll legislation was not barred, stating: "[s]ince the Eleventh Amendment does not bar suits against State officers to enjoin violations of federal law, and any monies that will be restored to the respondents from the State treasury are ancillary to the prospective relief which we order, petitioners' jurisdictional arguments are meritless." *Id.* at 774.

The Court of Appeals rejected petitioners' argument in this case as well, on the ground that there is no significant difference between the ten-day lag in *Surrogates I* and the lag in this case. (P.App.A12-13) The court was simply not convinced that "the release of the withheld money is barred by the Eleventh Amendment or that the action is moot because the withholding was complete as of March 31, 1991." *Id.*

Respondent respectfully submits that there is no legal distinction between the relief ordered by the Court of Appeals in *Surrogates I* and the relief ordered in this case. Therefore, this Court should also decline to exercise its discretion to review this judgment.

CONCLUSION

This court should deny the petition for a writ of certiorari.

Dated: March 24, 1993
Albany, New York

Respectfully submitted,

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Of Counsel

APPENDIX.

Opinion and Award of Herbert L. Haber, Arbitrator, Dated June 22, 1992.

In the Matter of the Arbitration between
PUBLIC EMPLOYEES FEDERATION

and

STATE OF NEW YORK

OER File No. 90-05-1272

PEF File No. 853-CA(a)

APPEARANCES:

For PEF:

Richard E. Casagrande, Attorney
By: Steven M. Klein, Esq.

For the State:

Walter J. Pellegrini, General Counsel OER
By: Richard W. McDowell, Esq.

BEFORE: Herbert L. Haber, Arbitrator

* * *

In accordance with their contract, the above named parties, hereinafter "PEF" and "State," have designated the

undersigned to hear and finally decide a dispute between them relating to the implementation of the "lag-payroll" legislation enacted by the Legislature and signed by the Governor.

Due notice having been given, hearings were held on January 28 and March 11, 1992, at which the parties appeared and were afforded ample opportunity to present evidence, examine witnesses, and make argument in support of their respective positions. Post-hearing briefs were submitted, which have been considered along with the material presented at the hearing in the preparation of the determination that follows.

The instant dispute has its genesis in a "deficit reduction" bill passed by the New York State Legislature on December 14, 1990, which contained a provision for a "separation lump sum payment plan," which is more commonly referred to as a "lag payroll." Simply put, the plan defers a total of five (5) days of pay earned during the last three (3) months of the 1990-91 fiscal year until separation from State service. The Governor signed the bill on December 26, 1990 and it was implemented shortly thereafter. It is undisputed that several of the prior Agreements collectively negotiated between the parties had included a provision containing a form of lag payroll, but that no discussions concerning the inclusion of a provision such as is in dispute here had occurred in the negotiations for the renewal of the then expiring Agreement. There had been some discussion regarding a State proposal for a mandatory five-day furlough, but none of the unions representing State employees had accepted it and legislation embodying such a proposal drafted by the Governor and submitted to the Legislature was never introduced in that body and did not become law.

The Union contends that the State's implementation of the lag payroll violated Articles 7, 41, and 47 of the Agreement between the parties. It points out that the deferment of

one week's pay under the plan results in an employee receiving a lesser annual salary than is stipulated in Article 7 which states in pertinent part:

> Effective April 1, 1990 a new salary schedule shall be established which shall consist of a hiring rate and a job rate for grades 1 through 37 and a hiring rate for grade 38. . . . The job rates shall be the job rates from the 1989-90 salary schedule increased by five and one-half (5.5) percent.

It further points out that the salary calculation under the lag payroll, which calls for employees to work ten (10) days and receive pay for only nine (9) days for five (5) consecutive payroll periods, does not conform to Article 41, which provides that "[e]mployees' salary payments will continue to be calculated on an appropriate 10 working day basis." Finally, the Union points out that Article 47 of the Agreement states:

> This agreement is the entire agreement between the State and PEF, terminates all prior agreements and understandings and concludes all collective negotiations during its term. *During the term of this Agreement, neither party will unilaterally seek to modify its terms through legislation or other means.* The parties agree to support jointly any legislation or administrative action necessary to implement the provisions of this Agreement. The parties acknowledge that, except as otherwise expressly provided herein, they have fully negotiated with respect to the terms and conditions of employment and have settled them for the term of this Agreement in accordance with the provisions thereof. (emphasis added)

It notes that, although there was no proof adduced that the Governor's office had drafted the lag-payroll legislation, it is undisputed that the Governor submitted the bill to the Legislature, provided a "Message of Necessity" enabling immediate consideration of the bill, and then signed the legislation after it was passed. The union acknowledges that only the Governor may submit a budget bill to the Legsialture, but it observes that the Legislature can modify the bill submitted and the Governor can sign the bill passed, decline to sign it, or veto it or any part of it. It argues that the Legislature's drafting of the bill ultimately signed by him, does not absolve the Governor of responsibility for it. Moreover, the Union points out that its contract is with the "State," that the Governor or his agent signs the Agreement as head of the executive branch and the contract is then approved, after such execution, by the Legislature pursuant to law. It avers that both branches of government are intimately involved in the contractual process and, therefore, actions by either constitute "State" action and can serve to breach the Agreement. Finally, it points out that virtually all of these arguments have been made and ruled on by Arbitrator George Nicolau in an arbitration involving the same lag-payroll issue between the State and Council 82, AFSCME, C82 No. C90-1883/OER No. 90-01-1217 (1991), in which the Arbitrator held that the State had violated the Agreement between the parties and directed the State to restore the withheld monies. It urges similar action here, with interest at the statutory legal rate from the date of the breach of the Agreement.

The State argues that the Union ignores the "dual aspect of the Governor's role in the legislative process" that, in addition to representing the State in its role as "employer," the Governor also represents the State in its "sovereign" capacity which in this instance encompasses his function as

an integral part of the budget process. After first noting that the lag legislation was not drafted or introduced by the Governor's Office or any other division of the Executive, it goes on to point out that only the Governor may submit a budget bill, and that a "Message of Necessity," which enables the Legislature to avoid the constitutional requirement that bills "age" for three (3) days before consideration, is issued by the Governor generally at the request of and as an accommodation to the Legislature. It further asserts that the governor's signing of the bill was also part of his "legislative function."

The State goes on to argue that, notwithstanding the possibility that the "lag legislation" does impair the Agreement between the parties, the Legislature is "constitutionally permitted to enact such legislation," and it offers a number of cases in support of this proposition (citations omitted). It contends, moreover, that such "constitutional" questions lie beyond my jurisdiction and that it is in the process of seeking vacature of the decision and award of arbitrator Nicolau in the Council 82 matter on the grounds, *inter alia*, that he exceeded the specific grant of arbitral authority provided in the parties' Agreement. The State also attacks, as a violation of Article 48 of the Agreement, the remedy (restoration of monies withheld under the lag-payroll legislation) Arbitrator Nicolau awarded. It points out that this article, entitled "SEVERABILITY," provides, in pertinent part, that "[i]n the event that the Legislature fails to implement Sections 7.1 through 7.7, any or all Articles may be reopened at the option of PEF or the State, and renegotiated." The State argues that this provision of "reopening and renegotiation" as a remedy governs any determination made in the instant matter.

DISCUSSION

The issue of whether the lag payroll violates the Agreement between the parties has largely been answered by the courts in a series of decisions addressing the constitutional questions relating to the lag payroll legislation, admittedly not before me, the most recent of which was issued on June 9, 1992 by the United States District Court for the Northern District of New York. In a case involving the parties to the instant matter, Judge Frederick J. Scullin, Jr., following the precedent he found to have been established in two prior cases, *Association of Surrogates and Supreme Court Reporters Within the City of New York*, 940 F.2d 766 (2d. Cir. 1991) *cert. denied* ____ U.S. ____, 112 S.Ct. 936, ____ L.Ed.2d ____ (1992); *Association of Surrogates and Supreme Court Reporters Within the City of New York*, 79 N.Y.2d 39, 588 N.E.2d 51, 580 N.Y.S.2d 143 (1992), found that the lag payroll "effects a substantial impairment of contract" and was not "reasonable and necessary," and held that it "violates the Contract Clause of the U.S. Constitution." My conclusions, on contractual grounds, are in accord with the substantive findings of the Court and with those of Arbitrator Nicolau, who also found the lag payroll legislation to have breached the Agreement between the State and Council 82.

I also find myself in agreement with Nicolau's response to the State's attempts to avoid responsibility for this violation. In rejecting the State's claim that the modification of the Agreement was solely the act of the Legislature, which it asserted was a non-party to the Agreement and therefore could not violate the Agreement, he stated:

> I cannot accept that reasoning. By statute and by Contract, specifically the 'legislative approval' pro-

> vision of Article 30, the Legislature is an integral element of the contract-making process. Without its approval, compensation clauses and like provisions are not effective. Once that approval is given, however, the Contract becomes a binding commitment of the State. If the Legislature could simply abrogate the commitment at its pleasure, the required approval becomes meaningless and the contractual commitment illusory.

In denying the State's assertion that the Governor did not violate the State's contractual commitment to not "unilaterally seek to modify its terms through legislation or any other means," he noted:

> It's true that the Governor's Office and GOER did not draft it. But it's obvious that the bill could not have moved forward to virtually immediate passage without the Governor's aid and cooperation and that it could not have become law at the time it did without his signature.
>
> These acts—the sending of the budget bill, the transmittal of the message of necessity and approval of the legislation—were not routine accommodations and minsterial acts. Nor were they required in the sense they were compelled by rule or statute. They were voluntarily performed. A choice was made.

The Executive and the Legislature are separate branches of government with distinct rights and duties. It is not necessary to examine closely into this area in the current instance since both are involved in the contractual process and the facts establish that each has acted to breach the Agreement.

The Arbitrator's determination of a remedy must conform to the law and the Agreement and a party may cite any provision of the Agreement in support of or in opposition to a particular remedy. The State is not denied the right to raise Article 48 as a shield against a monetary award because such defense has not previously been raised in the grievance or the issue of this matter. The State's reliance on that provision in the current instance, however, is misplaced. The Article contemplates a procedure for redress when the Legislature's failure to implement the salary provisions has legal basis. The State may not violate the Agreement and then seek the protection of the Agreement to, in effect, legitimize its improper act. I am satisfied that I have the authority to award a make-whole remedy and I consider the eight percent (8%) interest rate directed by Arbitrator Nicolau to be appropriate.

Accordingly, on the basis of the foregoing, I find and make the following

AWARD

The State of New York did violate the Agreement between the parties when the Governor submitted, the Legislature passed, and the Governor signed and implemented S.9195/A.12235.

The State is directed to pay to all members of the bargaining unit all salary withheld from them through the wrongful implementation of S.9515/A.12235 together with interest at the rate of eight percent (8%) interest per annum from the date such monies were withheld until such payment is made.

Dated: June 22, 1992

STATE OF NEW JERSEY)
) ss:
COUNTY OF BERGEN)

I, Herbert L. Haber, upon my oath as arbitrator, do hereby affirm that I have executed this instrument, which is my Award.

HERBERT L. HABER, Arbitrator

Decision of New York Supreme Court, Albany County, Dated July 30, 1992.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

IN THE MATTER OF THE APPLICATION

OF

HOWARD A. SHAFER, as President of the PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Petitioner,

against

JOSEPH M. BRESS, as Deputy of the New York State Governor's Office of Employee Relations; the NEW YORK STATE GOVERNOR'S OFFICE OF EMPLOYEE RELATIONS; and the STATE OF NEW YORK,

Respondents.

Index No. 4282-92

(Supreme Court, Albany County, Motion Term,
July 24, 1992)
(RJI No. 0192-30966)
(JUSTICE HAROLD J. HUGHES, Presiding)

APPEARANCES:

Richard B. Casagrande, Esq., Attorney for Petitioner, (Steven M. Klein, Esq., of Counsel), 1168-70 Troy-Schenectady Road, P.O. Box 12414, Albany, New York 12212-2414

Hon. Robert Abrams, Attorney General of New York State, Attorney for Respondents, (Ellen Lacy Messina, Esq., of Counsel), The Capitol, Albany, New York 12224

HUGHES, J.:

The application of the petitioner for a judgment confirming an arbitration award will be granted, and the cross petition of the respondents to vacate the arbitration award will be denied.

The State, through the Governor's Office of Employee Relations, entered into a collective bargaining agreement whereby the employees represented by the Public Employees Federation (PEF) were to be paid in a certain manner. As part of a plan to meet the State's current fiscal crisis, the Governor's office recommended that payment of a portion of wages earned by State employees be deferred. On December 14, 1990, the Legislature passed an amendment to section 200 to the State Finance Law, later signed by the Governor, which authorized a lag payroll. When the lag payroll was implemented against PEF's members, the union resorted to arbitration under the Collective Bargaining

Agreement to void it. While the arbitration was pending, Federal District Court Judge Scullin held in *McDermott and Condell v. Cuomo*, ____ Fed. Supp ____ (USDC, NDNY, June 9, 1992) that the legislation authorizing the lag payroll was unconstitutional as a violation of the Contract Clause of the United States Constitution. That determination has not been stayed, or overturned on appeal. Consequently, the arbitrator here had before him the relatively simple issue of whether an unconstitutional law could be the basis to abrogate the collective bargaining agreement. The arbitrator determined that the State violated the agreement, and directed the State to pay to all affected employees the salary wrongfully withheld, together with interest. The petitioner seeks to confirm that award, and the respondents argue that it should be overturned upon the grounds that it is irrational, that the arbitrator exceeded his authority, and that the award violates public policy.

Every court or other tribunal that has passed upon the lag payroll has rejected it. Here, respondents have failed to establish that the arbitrator exceeded his authority, acted irrationally, or that the award violates public policy.

Submit judgment.

Dated: July 30, 1992

Judgment of New York State Supreme Court, County of Albany, Entered August 12, 1992.

STATE OF NEW YORK SUPREME COURT

COUNTY OF ALBANY

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany, at the Albany County Courthouse, Albany, New York, on the 24th day of July, 1992.

Present:

Hon. Harold J. Hughes
Justice Presiding

IN THE MATTER OF THE APPLICATION

OF

HOWARD A. SHAFER, as President of the PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Petitioner,

For an Order Pursuant to CPLR §7510 to Confirm an Arbitration Award

and

JOSEPH M. BRESS, as Director of the New York State Governor's Office of Employee Relations; the NEW YORK STATE GOVERNOR'S OFFICE OF EMPLOYEE RELATIONS; and the STATE OF NEW YORK,

Respondents.

Index No. 4282-92
RJI No. 0192-30866

The petitioner, Howard A. Shafer, having applied pursuant to CPLR §7510 for confirmation of an award in arbitration, signed and acknowledged on the 22nd day of June, 1992, a copy of which is annexed to and made a part of this judgment, whereby petitioner was awarded payment to all affected members of the Professional, Scientific and Technical Services bargaining unit of State employees all salary wrongfully withheld from them, together with interest.

NOW, this proceeding having duly come on to be heard before the undersigned Justice of this Court at a Special Term held at the Albany County Courthouse on the 24th day of July, 1992, and upon reading and filing the notice of petition dated June 30, 1992, with proof of service thereof, the petition dated and verified June 30, 1992, together with annexed exhibits, the award signed and acknowledged on June 22, 1992, all in support of the application; and the respondents' answer and cross-petition with annexed exhibits dated and verified July 10, 1992, in opposition thereto; and petitioner's reply to respondent's answer and cross-petition dated and verified July 24, 1992; and the petitioner having appeared by Richard E. Casagrande, Esq. (Steven M. Klein, Esq., of counsel), in support of said application, and the respondents having appeared by the Honorable Robert Abrams, Attorney General of New York (Ellen L. Messina, Esq., of counsel), in opposition thereto, and after due deliberation, the Court having rendered a written decision dated July 30, 1992 directing the entry of judgment as hereinafter set forth, a copy of which is annexed hereto.

NOW, on motion of Richard E. Casagrande, Esq., (Steven M. Klein, Esq., of counsel), attorney for the petitioner, it is hereby

ORDERED, ADJUDGED AND DECREED that the application to confirm the arbitration award is in all respects granted; and that the cross-application to vacate said arbitration award is in all respects denied; and it is further

ORDERED, ADJUDGED AND DECREED that the petitioner recover from the respondents all costs and disbursements of this proceeding, to be taxed by the Clerk.

DATED: August 12, 1992

s/ HAROLD J. HUGHES
HONORABLE HAROLD J. HUGHES
Justice of the Supreme Court

ENTER: